



APPENDIX.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 568.

**THE CONSOLIDATED EXPANDED METAL
COMPANIES,**

Petitioner,

vs.

UNITED STATES GYPSUM COMPANY,
Respondent.

AFFIDAVIT OF WILLIAM L. KEADY.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss:

William L. Keady, being duly sworn, deposes and says
as follows:

I am President of United States Gypsum Company, respondent in the above-entitled case, and have successively held various managerial and executive positions with that company since 1924. I am familiar with the expanded metal business in the United States and with the expanded metal products of numerous manufacturers thereof.

I have read the affidavit of Lewis McC. Steenrod filed with the petition in the above-entitled case. The alleged classification of expanded metal into the two classes set

forth in that affidavit is not in accordance with any classification recognized in the expanded metal industry. The various types of expanded metal named in each of said alleged classes cover a wide range of weights, gauges and physical characteristics. Expanded metal of the type used for concrete reinforcement is ordinarily of heavy gauge and large mesh, whereas that used for plaster reinforcement or lathing is of relatively light gauge and small mesh. The type of expanded metal used for brake shoe reinforcement is intermediate between expanded metal lath and expanded metal for concrete reinforcement and is widely different in mesh size and gauge from both, being actually identical with certain of the materials enumerated in the alleged class (b) of the aforesaid Steenrod affidavit. The various types included in this latter alleged classification likewise cover a wide range of weights, gauges and other physical characteristics. All of the types of material included in each of the said alleged classes (a) and (b) are comprehended by the generic term "expanded metal," particularly as that term is used in the Cross patent No. 1,950,372 involved in this suit, in which specific reference is made to "expanded metal lath" and "plaster lathing" (p. 1, lines 9, 69) and also "concrete reenforcement" (p. 1, lines 55-6), and general reference is made to "expanded fabrics of all kinds" (p. 1, line 73).

To my knowledge there are numerous concerns which manufacture various types of expanded metal in the United States outside of the Sixth Circuit or are incorporated in states outside that circuit. Among these are the following concerns which manufacture such products at the places respectively named:

Alabama Metal Lath Co., at Birmingham, Alabama.

Ceco Steel Products Co., at Chicago, Illinois.

Milcor Steel Co., at Milwaukee, Wisconsin.

National Gypsum Co., at Niles, Ohio.

Truscon Steel Co., at Youngstown, Ohio, and Los Angeles, California.

On the basis of information which I have every reason to consider reliable, I believe that in every one of the circuits at least some of these concerns, as well as other manufacturers located in the Sixth Circuit, are doing business or have expanded metal products on sale through distributors or dealers, and that the said Ceco Steel Products Co. is a Nebraska corporation and Milcor Steel Co. and National Gypsum Co. are Delaware corporations. The above-mentioned products of the concerns named include in every case expanded metal lath and at least in the case of Milcor Steel Co. include in addition other types of expanded metal.

WILLIAM L. KEADY.

Subscribed and sworn to before me this 23rd day of December, 1942.

HELEN RATH,
Notary Public.

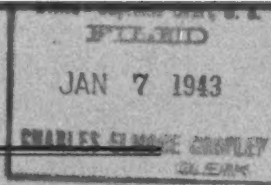
My commission expires April 26, 1944.

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REPLY BRIEF



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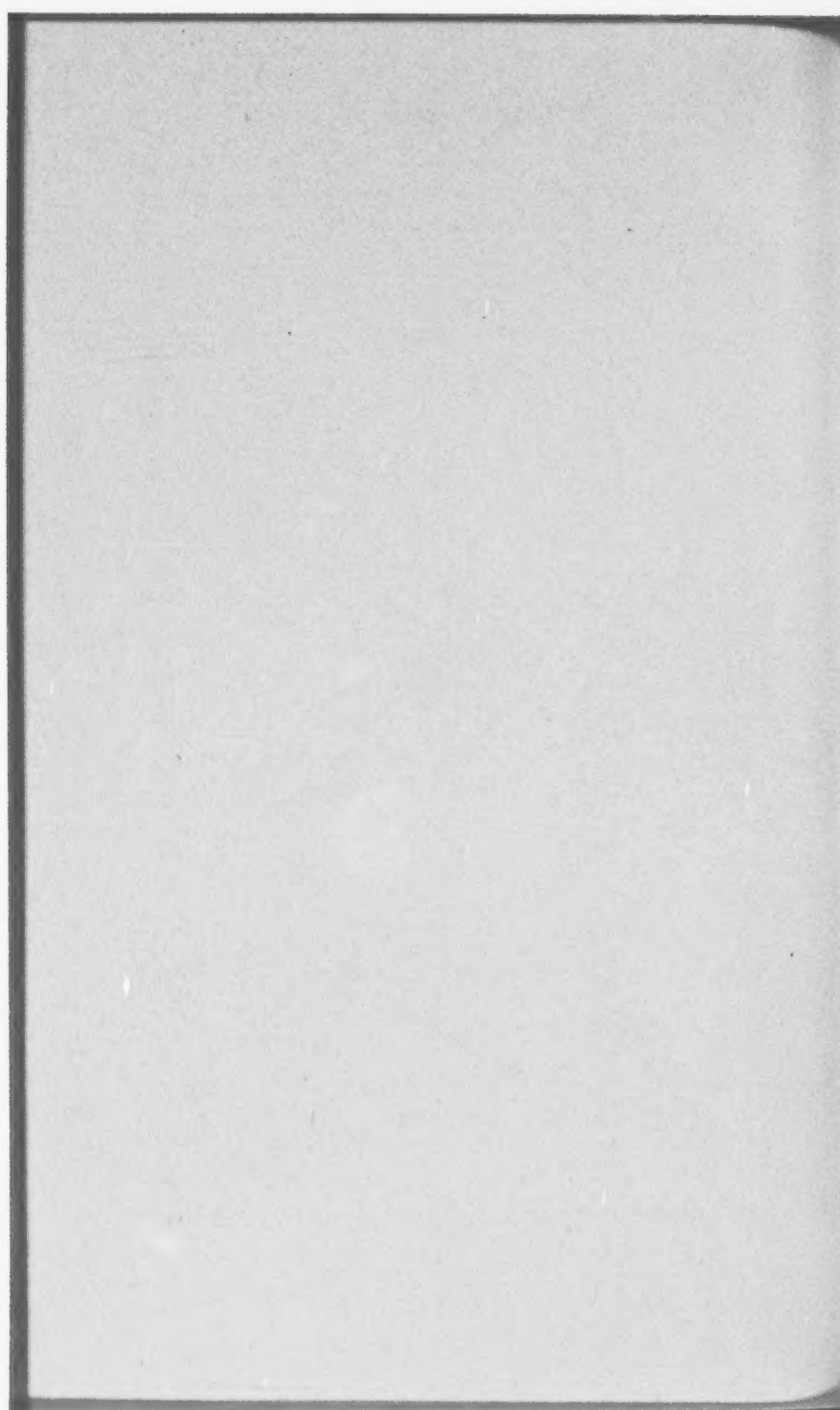
THE CONSOLIDATED EXPANDED METAL
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v.

UNITED STATES GYPSUM COMPANY, Respondent.

REPLY BRIEF FOR PETITIONER ON PETITION
FOR WRIT OF CERTIORARI.

WALTER J. BLENKO,
ARTHUR J. HUDSON,
Counsel for Petitioner.



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Summary of the Undisputable and Controlling Facts.

A detailed reply to respondent's assertions of fact is submitted herewith as an appendix. We give below a brief resume of the controlling facts about which there can be no dispute:

(a) The problem of making expanded metal free from dangerous burrs and sharp edges existed for more than *forty years* before its solution by Cross¹. Cross was the first to solve it².

(b) There was an "insistent demand" for a solution of the problem over the entire period, a demand emphasized by the fact that human safety was involved³.

(c) The prior art reference asserted by respondent to be the closest⁴—the Buckman patent—existed for

¹ Petition, pp. 2-4; *infra*, pp. 19-22.

² Petition, pp. 3-4; *infra*, pp. 22-3.

³ Petition, p. 2; *infra*, pp. 19-22.

⁴ Rec. pp. 541, 2992.

thirty-seven years⁵ before the solution of the problem⁶ but no one saw in it any way of meeting the insistent demand. The requisite wire brushes had been in existence even longer⁷.

(d) Many skilled workers in the art, including officers and employees of respondent's predecessor⁸, attacked the problem but failed to solve it. The president of respondent's predecessor said it was "impossible"⁹ of solution and attributed the failure "to the peculiarity of the material itself and the shape of the mesh"⁹.

(e) The Court of Appeals conceded that the Buckman machine required "adaptation"¹⁰ in order to make it suitable to deburr expanded metal. The Buckman machine is simply for scouring the surfaces of solid (imperforate) sheet metal for removing "loose scales or other impurities clinging thereto"¹¹, "just like a housewife polishing her silver plate"¹², and uses the *tips* of the brush bristles, while Cross utilizes a novel *side* action of the brush bristles¹³ to effect metal removal¹⁴.

(f) The Court of Appeals conceded that Cross had made an advance but said it "must be construed as within the skill of the art rather than invention"¹⁵, *despite the fact that the skilled men in the art failed to make it over a forty year period, although spurred by the insistent demand.*

⁵ Rec. p. 2400.

⁶ Rec. p. 1726.

⁷ Rec. p. 2394; Petition, p. 17; Respondent's Brief, p. 3.

⁸ Rec. pp. 727, 1973.

⁹ Rec. p. 1973.

¹⁰ Rec. p. 2992.

¹¹ Rec. p. 2402, ll. 23-4.

¹² Rec. p. 542.

¹³ Rec. pp. 13, 92-3.

¹⁴ Rec. pp. 13, 81.

¹⁵ Rec. p. 2994.

(g) The Court of Appeals, after stating "Much difficulty has, of course, been experienced by the courts in determining what improvements lie within the expected skill of the art"¹⁵, referred to its own decisions in the *Schriber-Schroth* cases, said that "Older cases are not very helpful", that "The patent law is presently in a state of flux" and that "Much water has flowed over the patent dam"; and, although noticing "the urgent insistence of the appellee [petitioner] upon the existence of a long felt need and alleged commercial success promptly following manufacture responding to the disclosures of the patent"¹⁶, rejected petitioner's contention because of what had "been made forcibly clear to us by the decisions of the Supreme Court in *Schriber-Schroth v. Cleveland Trust Co.*, 305 U.S. 47, and 311 U.S. 211, when considered in the light of our holdings in the same cases, 92 Fed. (2d) 330, and 108 Fed. (2d) 109"¹⁷.

It is plain, therefore, that the Court of Appeals has jettisoned the decisions prior to *Schriber-Schroth* that are favorable to a finding of invention, and particularly the rule that "Where the method or device satisfies an old and recognized want, invention is to be inferred, rather than the exercise of mechanical skill"¹⁸.

Commercial Aspects of the Invention.

(a) Respondent seeks to minimize the fact that there was an "insistent demand"¹⁹. The Court of Appeals accepted the fact²⁰, as did the District Court²¹, and as the Master found, the latter saying: "The evidence is

¹⁶ Rec. p. 2997.

¹⁷ Rec. p. 2998.

¹⁸ *Paramount Publix Corp. v. American Tri-Ergon Corp.*, 294 U.S. 464, 474.

¹⁹ Respondent's Brief, p. 6.

²⁰ Rec. p. 2997.

²¹ Rec. p. 2927.

convincing, in fact, there is no dispute"²², that for many years there had been much objection to the sharp edges and burrs and "That for many years there had been an insistent demand for such metal without the sharp edges is very clear from the evidence"²².

The two quotations on page 6 of respondent's brief in no way affect the situation. It is inevitable in any art that, even though a demand for something better exists, the trade must get along with what is available until the demand is met and make the best of it.

(b) Respondent asserts that "The real reason for the delay in the adoption of brushing as a regular commercial practice was the cost factor"²³. Significantly, it cites no supporting evidence and its assertion is in striking contrast with the *ante litem motam* statement of respondent's predecessor that it had investigated the possibility of brushing but failed, "principally due to the peculiarity of the material itself and the shape of the mesh"²⁴.

It may readily be conceded that here, as in any industrial operation, cost is a factor of some moment. The Cross patent teaches and claims brushing lengthwise of the diamonds and penetration of the bristles to the median plane of the sheet (see drawing at p. 18 of the Petition). If these teachings be followed, the mesh can be made burr-free despite "the peculiarity of the material"²⁴, and *at low brush cost*²⁵.

²² Rec. p. 2850.

²³ Respondent's Brief, p. 7.

²⁴ Rec. p. 1973.

²⁵ Rec. p. 1736.

Diversity of Opinions Below.

(a) Respondent is well aware of the fact that the decision of the District Court followed after the submission of a brief and argument for petitioner essentially the same as that advanced in the Court of Appeals and that the "authoritative patent decisions" urged on the District Court were the same as were urged by petitioner in the Court of Appeals, namely, the *Paramount* case and the prior decisions of this Court cited therein; 294 U.S. 464, 474. So there is in fact a direct conflict between the District Court and the Court of Appeals as to the applicability of the *Paramount* doctrine.

(b) Respondent alleges a misconception of the facts by the District Court because of the reference in its opinion to the preparation of material for "galvanizing"²⁶. This reference was obviously to the Buckman patent—concededly the closest reference—which shows the preparation of material for coating with tin.

(c) The comment of the Court of Appeals that failure to determine how to apply the brush "would characterize as dull even an otherwise highly skilled artisan"²⁷ is illuminating of the fundamental error in the Court of Appeals' decision. It is a notable instance of the *ex post facto* reasoning condemned by this Court in *Expanded Metal Co. v. Bradford*, 214 U.S. 366, 381, cited with approval in the *Paramount* case. The question is not whether the thing appears simple *now*, but whether it was within the expected skill of the workers in the art *before they had the benefit of Cross' disclosure*. That it was not within their expected skill is shown by the fact that the problem existed unsolved for forty years despite an insistent demand and persistent attempts at its solution.

²⁶ Respondent's Brief, pp. 8-9.

²⁷ Respondent's Brief, p. 9; Rec. p. 2997.

Concentration of the Industry in the Sixth Circuit.

(a) Filed herewith and printed at page 13 is a reply affidavit of Lewis McC. Steenrod which disposes of the allegations of the Keady affidavit²⁸.

(b) In its effort to show that there is no concentration of industry in the Sixth Circuit, respondent has found it necessary²⁹ to advance the extreme argument that petitioner might bring suits against distributors and dealers, a contention which is obviously unsound insofar as the process and apparatus claims are concerned. Suit on these claims can only be maintained against the manufacturer himself. *U. S. Code, Title 28, Section 109; Colgate & Co. et al. v. Proctor & Gamble Manufacturing Co.* (D.C. E.D. N.Y.), 25 F. 2d 160.

(c) Respondent urges that *Mackay Co. v. Radio Corp.*, 306 U.S. 86, and *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, are inapplicable here "because in each of those cases the patents were *sustained* by the Court of Appeals, so that the plaintiff had no incentive to sue in other circuits"³⁰. Respondent then says that "it has been shown very definitely" that petitioner could bring suit elsewhere "if it so desired". This contention is ill founded, as is shown by the foregoing paragraph and by the Steenrod reply affidavit, and as is tacit from the failure of the Keady affidavit to assert that there has been or is even likely to be any infringement outside of the Sixth Circuit. Quite apart from this, however, we submit that respondent's argument as to the *Mackay* and *Schriber-Schroth* cases is untenable. In the *Mackay* case the petitioner was "the only competitor of respondent in the business of world wide public radio communi-

²⁸ Respondent's Brief, p. 21.

²⁹ Respondent's Brief, p. 10.

³⁰ Respondent's Brief, p. 11; emphasis by respondent.

cation" so that, "incentive" or not, there was no probability of further litigation. Nor can we believe that this Court, as respondent seems to suggest, has one standard for the granting of the writ to *infringers* unsuccessful in the lower courts and another more rigid standard for the granting of the writ to *patentees* unsuccessful in the lower courts.

Misinterpretation of the Schriber-Schroth Decisions by the Court of Appeals.

(a) The factual summary at the beginning of this reply brief succinctly shows the misinterpretation. The vice of respondent's argument lies in its undue generalization of the issue. Of course we do not contend that mere commercial success or the mere solution of a long perceived problem must spell *validity* in every case. We do contend, consonant with the rule of the *Paramount* case, that the existence of a long felt need, the persistent trials and failures of men working in the art to satisfy that need, and the ultimate satisfaction by the patentee spells *invention*. The Court of Appeals held that the advance was "within the expected skill of the art" and it is precisely on this point that the conflict with the *Paramount* case and the misinterpretation of the *Schriber-Schroth* cases appears.

(b) The reference by the Court of Appeals to the *Paramount* case, as quoted by respondent³¹, was in connection with a discussion of analogous and non-analogous arts and not with the legal principles applicable to a case of long felt want and ultimate solution. And in the *Paramount* case the fact was that the want did not exist unsatisfied for a long period of time, as here. On the contrary, the solution of the problem followed promptly after it came into existence.

³¹ Respondent's Brief, p. 13.

(c) *Cuno Corp. v. Automatic Devices Corp.*, 314 U.S. 84, enounces no rule in conflict with the rule of the *Paramount* case which we urge here. This is plain from the last sentence of Mr. Chief Justice STONE's concurring opinion, saying "The [*Cuno*] case is therefore not one for the application of the doctrine that commercial success or the manifest satisfaction of a felt need will turn the scale in favor of invention." It seems plain, therefore, that if the Court of Appeals applied the *Cuno* case in the way that respondent urges, there is all the more reason for granting the writ so as to correct its error.

Failure to Apply Decisions of This Court.

(a) Respondent's discussion of *Expanded Metal Co. v. Bradford*, 214 U.S. 366³², begs the entire question. Respondent's argument is in substance that the Court of Appeals held there was no invention and therefore the *Expanded Metal* case is inapplicable, whereas the case is authority for the proposition that, in circumstances such as those at bar, a holding of invention should follow. Similarly all of the testimony cited by respondent³³ in support of its argument assumes that the first all-important step—visualizing the use of a brushing machine for the removal of burrs and sharp edges from inside the diamonds of expanded metal—had already been taken. But this assumption is refuted by the history of the industry.

(b) *Krementz v. The S. Cottle Company*, 148 U.S. 556, is applicable *a fortiori*. Respondent's predecessor was a skilled organization³⁴. Its attempts to solve the problem were not made merely by its president but by

³² Respondent's Brief, pp. 14-5.

³³ Respondent's Brief, p. 15.

³⁴ Rec. p. 570.

its engineer, Mr. Baker³⁵, and Mr. Prange, its factory superintendent³⁶. Respondent's predecessor "tried every known means of overcoming this trouble" and "spent a lot of money in experimental work" but failed³⁷.

(c) The difference in function between the machine of the patent held valid in *Hobbs v. Beach*, 180 U.S. 383, and the prior art device was surely not as great as the difference in function between the machine of the Cross patent and the Buckman machine³⁸.

The difference between the Cross invention and the American Brass Company machines is not merely a difference in form of the material under treatment, as respondent asserts³⁹, because in the Cross machine there is a wholly novel brush action effecting metal removal⁴⁰, whereas in the ordinary use of the American Brass Company machines there was no metal removal even of soft copper fins on the peripheries of the imperforate slabs⁴¹. Consequently, there is a new character of result. And, quite apart from this, it is plain that the inherent nature of expanded metal, and the location of the burrs inside the diamonds, presented a problem that baffled the art (it will be recalled that respondent's predecessor failed "principally due to the peculiarity of the material itself and the shape of the mesh"⁴²), so invention may well reside in the application of brushes to such a material; *Hobbs v. Beach*, *supra*.

³⁵ Rec. p. 1971.

³⁶ Rec. p. 1962.

³⁷ Rec. p. 1973.

³⁸ Petitioner's Main Brief, pp. 30-1.

³⁹ Respondent's Brief, p. 16.

⁴⁰ Rec. pp. 92-3; *infra*, p. 16.

⁴¹ Rec. p. 1865.

⁴² Rec. p. 1973.

(d) That phase of the rule of *Agawam Co. v. Jordan*, 7 Wall. 583, that favors the validity of the patent is applicable here. Even the most casual comparison of the letters of The Manufacturers Brush Co.⁴³ with the specification of the Cross patent will show that respondent's contention has no factual support.

Conflict of Decision With Other Circuit Courts of Appeals.

(a) The decisions of the Circuit Court of Appeals for the Second Circuit in *Leibing Automotive Devices, Inc. v. Wildermuth*, 104 F. 2d 411, and *Picard v. United Aircraft Corp.*, 128 F. 2d 632⁴⁴, are not in conflict with and do not overrule *Kurtz v. Belle Hat Lining Co.*, 280 F. 277. And obviously they cannot overrule this Court's decision in *Krementz v. The S. Cottle Company*, 148 U.S. 556⁴⁵.

(b) Far from departing, as respondent suggests⁴⁶, from the doctrine of *Traitel v. Hungerford*, 18 F. 2d 66, the Court of Appeals for the Second Circuit in *Picard v. United Aircraft Corp.*, *supra*, has indicated adherence thereto. At page 636 of the latter decision that court reiterates its rule that "the safest test is to try to reconstruct the history of the art before and after" the appearance of the putative inventions "and judge from that how far they demanded exceptional talents". The court then went on to show the inapplicability of the rule to the case then before it in that (a) Heron, one of the prior workers in the art, achieved some measure of success, (b) that the decisive prior art disclosure existed for only four years before Picard's application and (c)

⁴³ Respondent's Brief, pp. 5, 17.

⁴⁴ Respondent's Brief, p. 17.

⁴⁵ Petition, p. 9.

⁴⁶ Respondent's Brief, p. 18.

that the skilled workers in the art had not in that four year period turned their attention to the problem because they were fully engaged on more important work. Nor was it indicated that there had been any "insistent demand". But in the case at bar the record shows without dispute that the most pertinent prior art reference existed for *thirty seven years*, that there *was* an insistent demand, that the skilled workers in the art did attempt to solve the problem and that they failed and even characterized it as impossible of solution.

(c) We regret the citation of *Rousso v. City Towel Supply Co.*, 242 F. 655, as a decision of the Seventh Circuit. Respondent is correct in saying that it is a District Court decision in the ~~Tenth~~ ^{Fourth} Circuit. However, although not a Court of Appeals decision, it is indicative of the divergence of view in the inferior courts.

Public Importance.

Granting that invention in any particular case is a question of fact, it is one "to be determined, however, by rules of law"; WOOLLEY, J., in *Radiator Specialty Co. v. Buhot* (C.C.A. 3), 39 F. 2d 373, 376. Recognition of the rule just stated is tacit in the regular granting of the writ of certiorari by this Court to review the legal principles applicable to the question of invention presented in any particular case. The matter presented here raises clear-cut questions of law.

Keller v. Adams-Campbell Co., 264 U.S. 314⁴⁷, was a case which, upon examination, was found to present no issue except the question of infringement, and *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387⁴⁷, was a case which, upon examination, revealed no conflict such as had been supposed to exist. Neither deci-

⁴⁷ Respondent's Brief, p. 20.

sion is controlling here. Subsequent decisions of this Court cited at page 16 of our brief in support of the petition are believed to be more in point.

Respectfully submitted,

WALTER J. BLENKO,
ARTHUR J. HUDSON,
Counsel for Petitioner.

January 6, 1943.

REPLY AFFIDAVIT OF LEWIS McC. STEENROD.

State of West Virginia }
County of Ohio } ss.:

Lewis McC. Steenrod, having been first duly sworn according to law, deposes and says as follows:

1. I am the Lewis McC. Steenrod who filed an affidavit in support of the petition for certiorari herein. I have read the affidavit of William L. Keady, filed with the brief for respondent in opposition to said petition.

2. The classification of expanded metal as given in my original affidavit is a proper one and is in accordance with the evidence in this case as appears from pages 187 and 206 of the record.

3. "Industrial Mesh" such as is used for the making of machinery guards, waste baskets, window guards and the like is exposed in use; whereas, metal lath, concrete reinforcement and brake shoe reinforcement are embedded in plaster, concrete or cast iron and are not thereafter exposed to human contact. It is quite true that the Cross invention is usable for the purpose of brushing metal going into these latter uses, but its importance lies in the treatment of industrial mesh which, as stated, constitutes a continuous menace (if not brushed) throughout its life and which must be cut and shaped by manual work in fabricating it into articles of commerce. It was here that many accidents occurred with unbrushed mesh. The openings in metal lath are diamond shaped and rarely exceed 9/16" in length and 5/16" in width and are therefore so small that workmen do not get their fingers inside of the diamonds where their fingers can be cut by the burred edges, whereas in Industrial Mesh the openings are generally large enough that the fingers readily enter the mesh and, in the case of unbrushed metal, are subject to laceration.

4. There is in fact a concentration of the "Expanded Metal" industry in the Sixth Circuit. Metal Lath is not even called "expanded metal" in the trade. It is not made by the Golding method. Petitioner cannot bring suit for infringement against any of the concerns enumerated in the Keady affidavit. None of them brushes expanded metal and it is improbable that any of them will. In any event, Alabama Metal Lath Company, Ceco Steel Products Company and National Gypsum Company make metal lath only. The business of Milcor Steel Company is primarily metal lath. It has one machine that is not a metal lath machine, but the product of that machine is not classified as Industrial Mesh. Milcor Steel Company purchases its requirements for brushed expanded metal from petitioner. Truscon Steel Company has no facilities at its Los Angeles plant for making expanded metal. It has some equipment for this purpose at Youngstown, Ohio, but, as stated, it does not brush any expanded metal and from time to time it has purchased brushed expanded metal from petitioner. Moreover, as stated in paragraph 4 of my original affidavit, it would be impossible at this time for any manufacturer to construct a machine for practicing the invention.

(Signed) LEWIS MCC. STEENROD.

Sworn to and subscribed before me, a Notary Public in and for the said County and State, this 2 day of January, 1943.

(Signed) RUSSELL WEST,
Notary Public.

[NOTARIAL SEAL]

My Commission Expires July 28, 1951.

